LEE SEOW v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Smith & Neal JJ.) November 11, 1958]

[J.B. — F.M. Criminal Reference No. 1 of 1958]

Gaming — Common Gaming Houses Ordinance 1953, s.4(1)(c) — Assisting in carrying on a public lottery — What is a lottery — "Characters lottery" or "tikam ekor" — Whether a lottery.

In this case the appellant was convicted in the Magistrates' Court at Kulai for assisting in carrying on a public lottery in contravention of section 4(1)(c) of the Common Gaming Houses Ordinance. The alleged lottery in question was the well-known gambling operation known in this country as the "characters lottery" or "tikam ekor."

It was not in dispute that the appellant was in fact assisting in carrying on a "character lottery" but he appealed against his conviction on the ground that the "characters lottery" was not a lottery within the meaning of the Ordinance. Hepworth J. dismissed the appeal but, in view of the existence of a conflict of authority on the point, gave his certificate to enable it to be re-heard by the Court of Appeal.

Held: (1) reducing the matter to its simplest form, what happens in the character lottery is that the operator says to all who care to hear him "the Kuala Lumpur Turf Club will conduct a sweepstake in connection with a certain race on Saturday; if you pay me $1 then if you successfully predict the last two digits in the number of the winning ticket in that sweepstake I will pay you $70." He then proceeds to accept dollars and predictions in accordance with that offer and proceeds in due course to honour his promises if called upon to do so;

(2) it may or may not be a game; it may or may not be a devise; but it certainly is a method of collecting money and distributing money and the money is distributed in a manner depending upon chance, for it is by pure chance that the winning number of the Turf Club sweepstake is ascertained;

(3) it is clear beyond peradventure that such an operation falls fairly and squarely within the statutory definition of a lottery. If the public may have access to it, it is a public lottery and in any event until the contrary is proved it is to be deemed to be a public lottery, (see section 2 of the Ordinance) and if any person assists in carrying it on he is guilty of an offence in contravention of section 4(1)(c) of the Ordinance;

(4) it may well be that there is also involved betting within the meaning of the Betting Ordinance, 1953 but that fact does not rescue it from the predicament of being a lottery. The prosecution are at liberty to proceed under either Ordinance at their own choice but by reason of section 50 of the Interpretation and General Clauses Ordinance a person cannot be prosecuted and convicted under both Ordinances in respect of the same act.

Cases referred to:—

(1) *Coles v. Odhams Press Ltd.*, (1936) 1 K.B. 416, 427.

(2) *Public Prosecutor v. Woo Fong*, (1955) M.L.J. 235.

(3) *Kang Yeow Hooi & Ors. v. Public Prosecutor*, (1954) M.L.J. 233.

(4) *Public Prosecutor v. Lau Ting Kai*, (1955) M.L.J. 207.

(5) *Lim Seah Pong v. Public Prosecutor*, (1957) M.L.J. 5.

(6) *R. v. Chew Thia Hiang*, (1958) M.L.J. 17.

(7) *Director of Public Prosecutions v. Phillips*, (1935) 1 K.B. 391, 401.

(8) *Moore v. Elphick*, (1945) 2 All. E.R. 155, 157, 162.

CRIMINAL REFERENCE TO THE COURT OF APPEAL.

Lee Kuan Yew and *Omar Salleh* for the appellant.

D. C. Jackson (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Thomson C.J.: — This appellant was convicted in the Magistrates' Court at Kulai for assisting in carrying on a public lottery in contravention of section 4(1)(c) of the Common Gaming Houses Ordinance, 1953. The alleged lottery in question was the well-known gambling operation known in this country as the "characters lottery" or "tikam ekor."

It was never at any time seriously in dispute that the appellant was in fact assisting in carrying on a "characters lottery" but he appealed against his conviction on the ground that the "characters lottery" is not a lottery within the meaning of the Common Gaming Houses Ordinance. Hepworth J., dismissed the appeal but, in view of the existence of a conflict of authority on the point, gave his certificate to enable it to be re-heard by this Court.

The Common Gaming Houses Ordinance defines a "lottery" as follows:—

> "'Lottery' includes any game, method, or device whereby money or money's worth is distributed or allotted in any manner depending upon or to be determined by chance or lot, whether the same be held, drawn, exercised, or managed within or without the Federation."

No useful purpose would be served by embarking on a detailed exegesis of that definition. The name of the votaries of the Goddess Fortune is legion and the commercial exploitation of their devotion is an ever fruitful field. So, as was said by Humphreys, J., in the case of *Coles v. Odhams Press, Ltd.*,[1] "there will seemingly never be any finality on the question what is a

lottery". What this Court has to decide here is whether the operations known as the "characters lottery" which the present appellant was carrying on do or do not fall within the statutory definition.

The facts relating to that operation in the present case do not differ in any material respect from the facts in the case of *Public Prosecutor v. Woo Fong*[2] where it was described in the following terms:—

"What happened was that persons desiring to participate stake amounts of money on what they considered would be the last three digits or the last four digits of the number of the ticket which proved to be the winning ticket in the sweepstake organised by the Singapore Turf Club in connection with a particular horse race to be run at Singapore on 7th May, 1955. If the digits selected proved to be the correct ones then the person making the stake would be paid $700 or $4,000 for each dollar staked according as to whether he had placed his stake on three or four digits. Presumably, though there was no evidence of this, stakes would also be accepted in respect of the last two digits in which case presumably the amount to be paid in the event of the forecast proving correct would be $70."

In the case of *Kang Yeow Hooi & Ors. v. Public Prosecutor*[3] the Court of Appeal was concerned with the question of when a "characters lottery" ceased to be in progress and decided that question on the basis that that operation was a lottery within the statutory meaning without considering the point in terms. In the course of his judgment Mathew, C.J., observed—

"In our view, the essence of a lottery is the distribution of money or money's worth which is determined by lot or chance. The elements of distribution and chance must both be present."

In the case of *Public Prosecutor v. Woo Fong, supra,* the question actually in issue was whether an operator who took bets both on the two digits and the three digits in the same sweepstake number was carrying on a single lottery or two lotteries and the question of lottery or no lottery was not raised. Nevertheless, the "characters lottery" having been described in the passage which has already been quoted it was observed:—

"There can be no doubt that such an operation constitutes a lottery within the meaning of the Common Gaming Houses Ordinance for it is a method of distributing money according to pure chance."

In the meantime in the case of *Public Prosecutor v. Lau Ting Kai*[4] (which was not reported at the time of the judgment in *Woo Fong's* case) Wilson, J., had held that the "characters lottery", which he referred to by its Malay name of "tikam ekor", was not a lottery. He quoted the statutory definition, referred to the payments to be made on the winning tickets, and went on to say:—

"This money was to be paid out irrespective of how much money had been collected. It does not appear to me that this payment out to the punter can be described as a distribution. In the meaning to be ascribed to the word 'distribute' it is stated in the Concise Oxford Dictionary, *inter alia*, that it means 'to give a share to each of a number', and again, 'to divide into parts'. That, it would appear to me to apply to a case of the distribution of a fixed sum of prize money but not to the payment by a bookmaker on a bet, whether or not the bet is on a race horse or on a number to be ascertained by chance. So far as the word 'allotted' is concerned, the same dictionary states that it means 'the distribution by lot', so that we come back, to the meaning of the word 'distribute'."

The matter arose again in the case of *Lim Seah Pong v. Public Prosecutor*[5] where I expressed the view that Wilson, J., in the passage which has been quoted had given a too restricted meaning to the word "distribute". I considered the statutory definition and in the light of a number of English authorities set out the following three propositions:—

"One is that it is not of the essence of a lottery, that is of a distribution of prizes by chance, that the fund out of which the prizes are provided should consist only or at all of sums contributed by those taking part. The second is that it is not of the essence of a lottery that the amount paid out should bear any relation to the total amount paid in by the contributors. And the third is that a lottery may involve an element of betting, that is to say, the deliberate selection by the contributor of the event on the occurrence of which he is to be paid."

I accordingly held that the "characters lottery" fell within the statutory definition.

I pause at this stage to say that on further reflection I see no reason to depart from anything I said in *Lim Seah Pong's* case and Smith, J., and Neal, J., have authorized me to say that they are also in agreement with what was said there.

In the meantime the lottery had crossed the Causeway to Singapore and it recently came before the Singapore Courts in the case of *Reg. v. Chew Thia Hiang.*[6] Tan Ah Tah, J., referred to the definition of a lottery in the Singapore Ordinance (which is the same as the definition in ours) and said that in his opinion this definition connoted a number of participants taking part in the game, method or device whereby money or money's worth was distributed or allotted. He went on to say that it was clear that what happened in the "characters lottery" was that each participant laid a separate wager with the promoter and each transaction was in effect an isolated transaction unaffected in any way by any other transaction. In His Lordship's opinion it was an essential characteristic of any lottery that there should be a common element

among the participants, "a nexus or link which makes them participants in the same game, method or device." He was of the opinion that such a nexus was an essential characteristic that was lacking in the case of the "characters lottery" which therefore was not a lottery within the meaning of the Ordinance.

Before us counsel for the appellant not only relied to some extent on the Singapore case of *Reg. v. Chew Thia Hiang, supra,* but took the argument of that case a step further. He said that what was involved was in effect a system of betting; that betting is dealt with by the Betting Ordinance and therefore can only be an offence in the circumstances envisaged by that Ordinance, as for example when carried on in a common betting house or by a bookmaker in a club or in a public place.

It may well be that the "characters lottery" is not a lottery in the sense in which that word is normally used by the ordinary man. It is certainly not a straightforward sweepstake like the Social Welfare lottery or the raffle of a turkey at the charity bazaar. But that is beside the point. The question is whether or not it is a lottery within the meaning given to that word by the Ordinance. Is it a "game, method or device whereby money.....is distributed.....in any manner depending upon..... chance"?

Reducing the matter to its simplest form what happens is that the operator says to all who care to hear him "the Kuala Lumpur Turf Club will conduct a sweepstake in connection with a certain race on Saturday; if you pay me $1 then if you successfully predict the last two digits in the number of the winning ticket in that sweepstake I will pay you $70". He then proceeds to accept dollars and predictions in accordance with that offer and, it is to be hoped, proceeds in due course to honour his promises if called upon to do so.

This may or may not be a game; it may or may not be a device; but it certainly is a method in the sense that it is a way of doing something. And what is it a way of doing? It is certainly a way of collecting money but it is also a way of distributing it, for as was said by Lord Hewart, L.C.J., in the case of *Director of Public Prosecutions v. Phillips.*[7] —

> " There is no magic in the word 'distribution'. The word 'payment' will do just as well."

And in what manner is it distributed? It is distributed in a manner depending upon chance, for it is by pure chance that the winning number of the Turf Club sweepstake is ascertained.

It is thus clear beyond peradventure that such an operation falls fairly and squarely within the statutory definition of a lottery. If the public may have access to it it is a public lottery and in any event until the contrary is proved it is to be deemed to be a public lottery (see section 2 of the Ordinance). And if any person assists in carrying it on he is guilty of an offence in contravention of section 4(1)(c) of the Ordinance.

It may well be that there is also involved betting within the meaning of the Betting Ordinance, 1953 (incidentally there was no Betting Ordinance in the State of Johore prior to 1953 although there was a State Enactment corresponding to the Common Gaming Houses Ordinance). No doubt a person receiving stakes in connection with such an operation could in certain circumstances be prosecuted under the Betting Ordinance. That, however, is no reason why he should not be prosecuted and convicted under the Common Gaming Houses Ordinance. Certainly by reason of section 50 of the Interpretation and General Clauses Ordinance (which corresponds to section 33 of the English Interpretation Act, 1889) he cannot be prosecuted and convicted under both Ordinances in respect of the same act. That, however, does not mean that the prosecution are not at liberty to proceed under either Ordinance at their own choice.

Moreover it is clear that in England the fact that a scheme which would otherwise be a lottery involves an element of betting does not rescue it from the predicament of being a lottery (see *Coles v. Odhams Press Ltd., Supra,* and *Moore v. Elphick*[8]) and support for the view that the legislature here had the same intention is to be found in the wording of section 11 which refers to any "record of stakes or wagers in or relating to a lottery"

The appeal is dismissed.

Appeal dismissed.

Solicitor: *M. Ismail.*

EK LIONG HIN LTD. v. THE OFFICIAL ASSIGNEE of the Property of KOH HOR KHOON & ORS.

[C.A. (Whyatt C.J., Tan Ah Tah and Chua JJ.] January 13, 1958]

[Singapore — Civil Appeal No. 14 of 1957]

Moneylending — Moneylenders Ordinance (Cap. 193), s.2(d) — Carrying on any business